

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

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77-6075

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Plaintiff-Appellant,

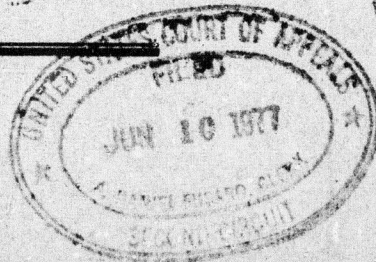
v.

COMMITTEE OF INTERNS AND RESIDENTS,
and
NEW YORK STATE LABOR RELATIONS BOARD,
Defendants-Appellees.

On Appeal from the United States District Court
For the Southern District of New York

BRIEF FOR AMICUS CURIAE
ALBERT EINSTEIN COLLEGE OF MEDICINE

GERALD A. BODNER
Attorney for Albert Einstein
College of Medicine
1300 Morris Park Avenue
Bronx, New York 10461



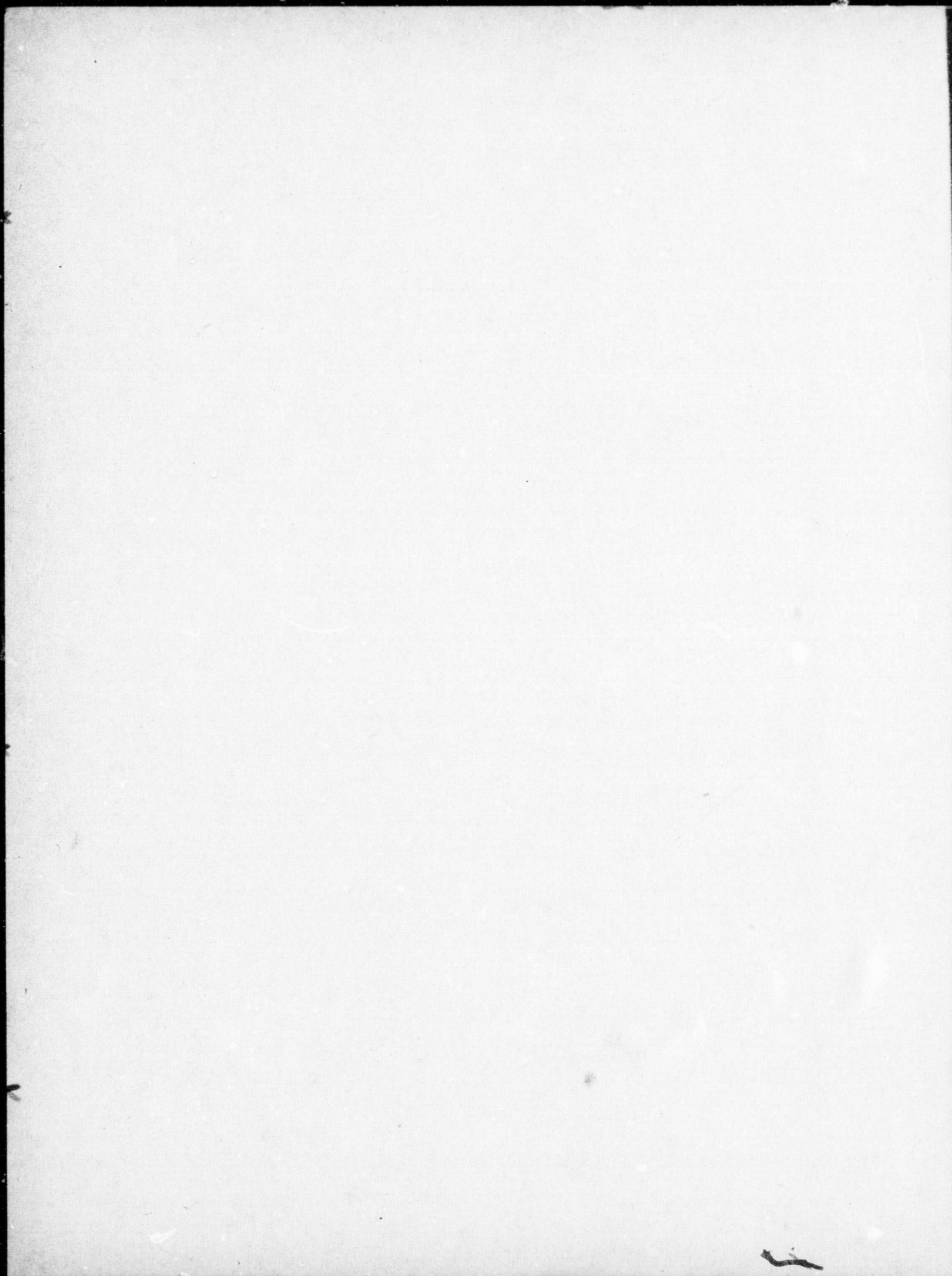


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

-against-

77-6075

COMMITTEE OF INTERNS AND RESIDENTS

and

NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees,
-----x

MEMORANDUM OF LAW OF AMICUS CURIAE
ALBERT EINSTEIN COLLEGE OF MEDICINE

STATEMENT OF THE CASE

This memorandum is submitted on behalf of amicus curiae Albert Einstein College of Medicine in support of the appeal of the National Labor Relations Board (hereinafter "NLRB" or the "Board") from a decision rendered by the District Court, Southern District of New York (Stewart J.) on January 3, 1977 with judgment entered thereon on March 9, 1977, 426 F.Supp. 438 (1977).

The District Court's decision first found that "...the considerations of federalism and comity or the adequacy of

state remedies [do not] require that we decline to exercise our jurisdiction..." (426 F.Supp. at 447); and secondly concluded on the merits that "...the NLRA does not preempt the exercise of state power over the labor relations of house-staff because we find that there is no national labor policy which requires that housestaff be unregulated by all bodies of labor law..." (426 F.Supp. at 453).

It is the position of amicus that the District Court's conclusion on the merits in regard to preemption was erroneous as a matter of law for the several reasons that appear hereafter.

STATEMENT OF THE FACTS

1. Albert Einstein College of Medicine (hereinafter "College of Medicine") amicus herein, is an educational institution primarily dedicated to the teaching and training of graduate and postgraduate physicians. The College of Medicine is also involved in medical research designed to expand man's knowledge of the causes and cures of various diseases. Related to the above purposes, the College of Medicine is engaged, as a health care institution, in overseeing the provision of medical services which provide necessary teaching, training and research opportunities.

The individuals at the College of Medicine whose status is at issue are approximately forty clinical fellows. These

clinical fellows are presently pursuing a course of study designed to qualify them for certification in a medical sub-specialty, such a nephrology or hematology. They are primarily engaged in research and study connected with obtaining an education in their selected field of medical sub-specialty. As required by the regulations of the National Institute of Health (hereinafter "NIH"), their clinical exposure is limited to and tailored to those matters necessary to meet their specific educational research needs in the sub-specialty of their choice. Their "salary" essentially consists of an educational stipend provided by NIH.

2. Immediate and irreparable harm to the proper conduct of the College of Medicine's activities as an educational institution currently exist because of the fervent actual and threatened activities by the appellees, and in particular the Committee of Interns and Residents to have appellee, New York State Labor Relations Board (hereinafter "NYSLRB") assert jurisdiction over the College of Medicine which is already subject to the jurisdiction of the NLRB, with the expressed aim of having NYSLRB countermand and subvert the decisions of the NLRB concerning this employer's labor relations obligations. Likewise, the appellees would have NYSLRB completely reverse the determinations of the NLRB as to the rights of employer College of Medicine to not be required to engage in collective bargaining with those

individuals who the NLRB has determined are "primarily students", and should not have such collective bargaining rights. Reversal of the NLRB determination would cause injurious disruption of educational programs involving interns, residents and fellows of the College of Medicine.

3. The College of Medicine has been directly and intimately involved in all prior stages of this matter - as one of the lead cases before the NYSLRB, as a party defendant before the New York State Courts, and as an amicus in the District Court proceeding at issue herein.

4. Apart from the matters directly relating to the College of Medicine as indicated above, the College of Medicine adopts the Statement of Facts set forth by the appellant NLRB in its brief to this Court.

STATEMENT OF THE ISSUE PRESENTED

Was the District Court's conclusion that Federal pre-emption does not pertain erroneous for the following reasons:

I. The District Court's own conclusions regarding Congressional intent and conflict.

A. The Court's conclusion of a Congressional intent to preempt State regulation of labor relations at health care institutions.

B. The Court's conclusion of conflict between State and Federal regulation of health care institutions.

II. The District Court's misinterpretation of statutory and case law requirements regarding preemption.

A. The legislative requirement for State jurisdiction.

B. The Supreme Court's "Bethlehem" decision.

C. The rule of "labor activity arguably protected or prohibited by the NLRA".

D. The rule of federal occupation of the labor relations field.

III. The District Court's invalidation of the NLRB's national labor policy consideration for its decisions on "student/employees".

A. The District Court's misinterpretation of prior NLRB decisions.

B. The District Court's failure to understand and accept the Board's rationale for its labor policy.

I. The District Court's Conclusions Regarding Congressional Intent and Conflict by Themselves Require a Finding of Preemption.

A. The District Court's Conclusion of Congressional Intent to Preempt State Regulation of Labor Relations at Health Care Institutions Necessarily Mandates a Finding of Preemption.

The law is clear that preemption must occur where Congress intended NLRB preemption of State regulation concerning the labor relations of a particular category of employers. (1)

That Congress so intended for health care institutions is abundantly clear from the 1974 Amendments (hereinafter "Health Care Amendments"), Public Law 93-360, to the National Labor Relations Act (hereinafter "NLRA" or the "Act"), 29 U.S.C. 151-169, and the related Congressional hearing and comments. Indeed, the District Court admitted as much when it found that:

"...Congress contemplated the preemption of state regulations of labor relations covered by these [Health Care] Amendments. We conclude such was the intent of Congress."
(citations omitted), 426 F.Supp. at 448.

While this conclusion should be determinative of the issue of preemption, the District Court's decision posits an interesting limitation to the rule of preemption of covered health care employer labor relations nowhere found or suggested in any of the underlying Congressional acts or statements

(1) Machinists v. W.E.R.C., 427 U.S. 132, 92 LRRM 2881 (1976); Teamster's Union v. Morton, 377 U.S. 252, 56 LRRM 2225 (1964).

or Supreme Court decisions interpreting them; namely, an exception to preemption for individuals at such employers whom the NLRB determines not to be entitled to collective bargaining rights as "employees" under Section 2(3) of the Act.

Nowhere in the numerous statements of Congressional intention to preempt State regulation of labor relations at health care institutions cited by the District Court - or in any other known citations - is there the slightest indication that the Congressional intention was directed to less than the entirety of labor relations at health care institutions or is limited to Section 2(3) employees. Nor, it should be added, does the District Court point to a single judicial decision as supporting its novel exception, for indeed there appears to be none.

Moreover, Congress was undoubtedly well aware of the fact that numerous groups of individuals (such as managerial and confidential individuals) have routinely been denied by the Board the rights and status of Section 2(3) "employees"; (2) yet, Congress in no way indicated an intent to provide them with an exception from the recognized rule of NLRB preemption.

Indeed, the absence of such an exception is at the very heart of the Supreme Court's decision in Bethlehem Steel Co.

(2) NLRB v. Bell Aerospace Co., Division of Textron, 416 U.S. 267, 85 LRRM 2945 (1974).

v. NYSLRB (3), where the Court fully upheld the rule of preemption in specific regard to individuals to whom the Board had denied collective bargaining rights. To do otherwise, in fact, would cause inconceivable disruption of the nation's intended scheme of labor relations whereby all individuals denied collective bargaining rights by the National Board for policy reasons could approach their state labor boards for the same, if not greater, labor relations rights. (4)

B. The District Court's Factual Conclusion of Conflict Between Federal and State Regulation of Health Care Institution Labor Relations Must Also Mandate Preemption.

The District Court's decision omits any reference to the legal principle that mandates preemption wherever there is any degree of even potential conflict between Federal and State regulation of labor relations - a principle clearly enunciated by the Supreme Court. Thus, in the most recent review of the various grounds which mandate a finding of preemption, the Supreme Court noted:

(3) 330 U.S. 767 (1947).

(4) As, for example, managerial and confidential employees at commercial employers. Housestaff working in New York would become entitled to greater rights under NYS Labor Law than under the NLRA such as the right to obtain arbitration of their collective bargaining demands; Article 20 of NYS Labor Relations Act, Section 716.

"...this Court has recognized that the broad powers conferred by Congress upon the National Labor Relations Board to interpret and to enforce the complex Labor Management Relations Act...necessarily imply that potentially conflicting 'rules of law, of remedy, and of administration' cannot be permitted to operate'. Vaca v. Sipes, 386 U.S. 171, 178-179, 64 LRRM 2369 (1967), quoting San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242, 43 LRRM 2838 (1959)." (5)

Strikingly, the District Court reaches the factual conclusion that in the situation involved in the instant case, such potential conflict clearly exists. As the District Court admits:

"Finally, we recognize that the provisions of the New York SLRA [State Labor Relations Act] pertaining to hospital workers are not identical to the provisions of the NLRA health care amendments. Sections 713 and 716 of the Labor Law [McKinney's 1965] prohibit strikes and lockouts and require binding arbitration of any grievance or dispute in non-profitmaking hospitals. These requirements are more restrictive than the strike and arbitration provisions set forth in the NLRA §8(d) and (g) (see discussion supra at 450)", 426 F.Supp. at 453.

The District Court decision then suggests that the conflict between state and national act coverage is out-balanced by Congress' "...basic intent that the labor relations of these [health care] institutions be regulated in order to prevent such [labor strike] disruption", 426 F.Supp.

(5) Farmers v. United Brotherhood of Carpenters and Joiners, 97 S.Ct. 1056, 1061; 94 LRRM 2757, 2761 (1977).

at 453. There is no cited basis for the District Court's discernment of such supposed Congressional intent nor is such intent very likely since Congress specifically considered and rejected various prohibitions on strikes at health care institutions as part of the 1974 Health Care Amendments; see remarks of Congressman Montgomery, 120 Cong. Rec. H 4594 (daily ed., May 30, 1974); remarks of Congressman Bauman, 120 Cong. Rec. H 4595 (daily ed., May 30, 1974); remarks of Senator Williams, 120 Cong. Rec. S 12103 (daily ed., July 10, 1974). As the Senate Committee on Labor and Public Welfare noted in its report to accompany the bill ultimately adopted:

"The Committee is aware that a work interruption at particular hospitals, such as those in rural areas, could pose special problems of continuation of patient care. It is the Committee's hope that parties to a dispute in such an institution would be cognizant of such special problems and take steps, either in advance of any dispute, or during its resolution, to mitigate the effects of a scarcity of alternative local resources." (6)

Indeed, the lack of such Congressional intent to prohibit strikes - discerned by the District Court alone - was recently dealt with quite explicitly in regard to a request by the State of Minnesota for NLRB cession of jurisdiction

(6) 120 Cong. Rec. S Report No. 93-766, printed April 2, 1974 at p. 5 thereof.

under the provisions of Section 10(a) of the Act, 29 U.S.C. 160(a), which requires a determination as to whether the State's labor law provisions are "...inconsistent with the corresponding provision of this [NLR] Act...." Minnesota, as New York, has state labor statutes prohibiting strikes in health care institutions and mandatory compulsory arbitration to resolve outstanding issues. For this very reason, state law was determined to be entirely inconsistent with the NLRA.

"Thus, the prohibition of strikes, with reliance upon compulsory arbitration for ultimate solution of labor disputes, is a significant restriction upon the free collective bargaining process as defined by Congress. The national policy is to encourage voluntary agreements freely arrived at after 'good faith' bargaining between the parties and not to require compulsory arbitration. Accordingly, we conclude that there is conflict between state and Federal policy in this respect, and that since state action under the Minnesota law would conflict with the national policy of encouraging free and unfettered collective bargaining we should not permit state law to frustrate the national scheme of our Act by requiring compulsory arbitration." (7)

Not only is the District Court incorrect in its discerned Congressional intent to prohibit disruption as health care institutions, but its suggestion that this supposed

(7) In re Minnesota, 219 NLRB No. 170, 89 LRRM 1785 (1975).

intent can somehow overcome the clearly recognized conflict between Federal and State labor law and procedures is without any basis in law whatever. The District Court has simply chosen to disregard the Supreme Court's rule of preemption wherever there is conflict of law, remedy or administrative procedures(8) which clearly encompasses the situation involved in the instant case.(9)

(8) Vaca v. Sipes, supra.

(9) The principle of conflict is also inherent in Hanna Mining Co. v. District 2, M.E.B.A., 382 U.S. 181 (1965).

II. The District Court's Decision is Erroneous in that It is Based on Misinterpretations of Statutory and Case Law Requirements Regarding Preemption.

A. The District Court Decision Totally Ignores and Violates the Legislative Provision on "Federal-State Jurisdiction".

The NLRA specifically provides the most basic requirement for waiver of preemption in Section 14(c) of the Act which provides the overall legislative concept. That section - which is officially titled "Federal-State Jurisdiction - provides that the states may assert jurisdiction where the NLRA has:

"decline[d] to assert jurisdiction over any labor dispute involving any class or category of employers, where in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" (emphasis added). (10)

The District Court's decision virtually ignores this legislative provision and its requirements in their entirety. Moreover, the District Court's decision directly contravenes Section 14(c) in that it allows a waiver of preemption despite the Court's recognition that the NLRB has, in fact, asserted jurisdiction over and found health care institutions to be "'employer[s]' under the NLRA for the purposes of any disputes relating to housestaff...", 426 F.Supp. at 442,

(10) 29 U.S.C. Section 164(c). In addition, states can obtain jurisdiction if the NLRB cedes such jurisdiction pursuant to Section 10(a) of the Act; 29 U.S.C. Section 160(a) but such cession is in no way relevant to the instant case.

citing NLRB decision in Kansas City General Hospital, 225 NLRB No. 14A, revised order of November 8, 1976). (11)

Moreover, there is not even a suggestion in the District Court's opinion that the NLRB has declined to assert jurisdiction over "any labor disputes" involving health care institution employers. Indeed, there are enumerable NLRB assertions of jurisdiction over disputes involving health care employers. (12)

Finally, in this regard it cannot even be suggested that the NLRB has, as Section 14(c) further requires, found that "the effect of such dispute[s] on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction". Rather, although totally ignored by the District Court, the NLRB has even issued advisory opinions to health care institutions such as this amicus in regard to

(11) While the District Court cites only Kansas City revised order, supra, this finding of employer status and assertion of jurisdiction over the employer has been made consistently in all NLRB decisions on interns, residents and fellows; Cedars-Sinai Medical Center, 223 NLRB No. 57, 91 LRRM 1398 (1976); St. Christopher's Hospital, 223 NLRB No. 154, 92 LRRM 1039 (1976); St. Clare's Hospital, 223 NLRB No. 163, 92 LRRM 1001 (1976); Buffalo General Hospital, 224 NLRB No. 17, 92 LRRM 1197 (1976); Wayne State University, et al., 226 NLRB No. 168; Deaconess Hospital of Buffalo, New York, 226 NLRB No. 164.

(12) A small sampling of such cases include: Mercy Hospitals of Sacramento, Inc., NLRB No. 131; Presbyterian Medical Center, 218 NLRB No. 192; Children's Hospital of Pittsburgh, 222 NLRB No. 90; Sutter Community Hospitals of Sacramento, 227 NLRB No. 18; Baptist Hospital, Inc., 223 NLRB No. 34; St. Vincent's Hospital, 223 NLRB No. 98.

the proceedings involving interns, residents and fellows advising that the NLRB finds their operations to have a sufficiently substantial impact on commerce to warrant the exercise of its jurisdiction inasmuch as "[Albert Einstein College of Medicine's] operations do satisfy the Board's current discretionary jurisdictional standards", 226 NLRB No. 185, slip op. at p. 4). See also Advisory Opinion in Misericordia Hospital Medical Center, 224 NLRB No. 126.

B. The District Court's Decision Also Relies on a Misinterpretation of a U.S. Supreme Court Decision of Admittedly Determinative Applicability.

The District Court recognizes the absolute requirement of preemption in the circumstances detailed by the Supreme Court in the case of Bethlehem Steel. As the District Court states:

"The Act has also been interpreted to preempt state regulation in areas where the Board has declined to exercise its jurisdiction on the ground that it would not effectuate the policies of the Act to do so. Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1947)." 426 F.Supp. at 447.

The District Court, however, then proceeds to distinguish the instant case from Bethlehem on grounds absolutely in conflict with the Supreme Court's opinion in Bethlehem.

Thus, the District Court notes:

"Plaintiff and amici urge this court to apply the rationale of Bethlehem Steel here.

The problem we find with doing so in this case is that one of the elements vital to Bethlehem Steel is missing. Bethlehem Steel was premised on the fact that the Board had jurisdiction over the foremen's petition." 426 F.Supp. at 449-450.

In fact, however, in Bethlehem, the Board had absolutely the same jurisdiction over the foremen's petition that the Board has over petitions filed on behalf of house-staff; namely, jurisdiction over the employer and the industry, accompanied by a similar Board declination for reasons of national labor policy to afford these individuals collective bargaining rights.

Indeed, the District Court even cited the statement from the Supreme Court's decision in Bethlehem where the Supreme Court noted that:

"The federal board has jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general". 426 F.Supp. at 450.

Yet this situation is identically true in the instant case where the Board has "jurisdiction of the industry in which these particular employers are engaged and has asserted control of their labor relations in general". Thus, the Board has been given express statutory authority over the health care industry (1974 Amendments to NLRA). And the

NLRB has made it expressly clear that it has asserted control over this industry's labor relations in general. Thus, in its decisions, the NLRB has determined that "it will effectuate the policies of the Act to assert jurisdiction herein" (Kansas City General Hospital, revised, supra, slip op. at p. 3) and that moreover:

"[The Board] has not put hospital residents and interns beyond the reach of national labor policy but has rather held that to extend them collective bargaining rights would be contrary to that very policy".
(slip op. at p. 5).

Indeed, the parallel between Bethlehem and the instant case in all relevant respects is overwhelming. In the instant case, as in Bethlehem, the Board denied the individuals in question collective bargaining rights; (see Bethlehem, supra at 770).

In the instant case and in Bethlehem, the Board's denial of collective bargaining rights was not based on an express statutory exclusion (see Bethlehem, supra at 770). (13)

In the instant case and in Bethlehem, the Board, acting within its discretionary authority, denied collective bargaining rights for Board-determined national labor policy reasons. See Bethlehem, supra at 775.

(13) At that time there was no statutory exclusion of supervisors as currently exists under Section 2(3) of the Act, added in 1947 by the Taft-Hartley Amendments C120, 61 Stat. 136.

Indeed, even assuming arguendo the District Court's statement that the Board does not have a consistent policy of excluding students, this inconsistency too was precisely true in Bethlehem. In fact, in Bethlehem, the Court noted that the NLRB's policy as to bargaining rights for foremen had already changed at least three times (at 770).

The only difference between Bethlehem and the instant case even suggested by the District Court is an apparent misconstrual to the effect that the Board in Bethlehem supposedly first ruled the supervisors there at issue to be "employees" and secondly declared that nevertheless, as a matter of labor policy, they should be denied collective bargaining rights. Not only is it questionable whether such technical difference actually existed in the Board's approach to Bethlehem(14), but it should be obvious in the extreme that any such difference would be without the slightest iota of substance. The reality is that in both cases, the individuals at issue were determined by the Board not to be entitled to collective bargaining rights because of national labor policy considerations. In fact, it is clear in present Board decisional procedure that the notation of non-NLRA

(14) No reference to a Board opinion in Bethlehem is anywhere cited and the District Court's comment appears based on a misconstrual of a comment in the concurring opinion (at 777) not even reflected in the majority opinion.

"employee" status automatically flows from the Board's determination that individuals are not to be entitled to collective bargaining rights because of national labor policy considerations. Indeed, in the Board's present terminology, NLRA "employees" without collective bargaining rights for labor policy reasons would be a non-sequitur. Thus, the very individuals involved in Bethlehem, namely supervisors, currently are specifically defined as not being "employees" under the NLRA and continue to be denied collective bargaining rights.(15) Similarly for other categories denied collective bargaining for policy reasons, the Board, with Supreme Court approval, has stated that "such individuals [with managerial status] cannot be deemed to be employees for the purposes of the Act. Accordingly, we reaffirm the Board's position that representatives of management may not be accorded bargaining rights under the Act..." (emphasis added). (16)

- C. The District Court's Conclusion that the Only Labor Activities Considered by the NLRB to be "Arguably Protected or Prohibited" by the Act are Those Involving "Employees" is Erroneous.

The District Court correctly recognizes that one of the several legal bases for requiring preemption is whenever the

(15) Non-"employee" status for supervisors has now been statutorily defined by Sections 2(3) and 2(11) of the Act.

(16) Bell Aerospace, supra; quoting Swift & Co., 115 NLRB 752, 753-4 (1956).

labor activity is arguably "protected or prohibited" by the Act (citations omitted), 426 F.Supp. at 447.

However, the District Court concludes that the labor activity in the instant case is not arguably protected or prohibited by the Act on the basis of the District Court's express assumption that Sections 7, 8 or 9 of the Act regulate only the activities of statutory "employees". As the District Court states:

"Therefore [since housestaff are not statutory employees] by their terms Section 7, 8 or 9 cannot apply to protect or prohibit any actions at all taken by house staff or their union or any action taken by an employer with regard to house staff or their union; Cf. Beasley and Hanna Mining, supra", 426 F.Supp. at 449.

This assumption by the District Court is simply invalid. Indeed, the District Court cites absolutely no basis in NLRB or judicial case law for its assumption and the only citations it notes as relevant are recognized by the District Court to be contrary to its position (see cited reference by Beasley v. Food Fair, 416 U.S. 653 (1974) and Hanna, supra, 426 F.Supp. at 449).

It should be noted that the delineation of the "protected or prohibited" doctrine as one of the bases for requiring preemption is, by its very terms, dependent not on whether the individuals are "protected" by the Act, but by whether the labor activity is either arguably "protected or

prohibited". (17) In the instant case, the NLRB made clear that the labor activity involved, namely collective bargaining, was meant to be "prohibited" where it involved house-staff. As the Board has said:

"It is for this reason that the Board has determined that the national labor policy does not require - and, in fact, precludes - the extension of collective-bargaining rights and obligations to situations such as the one now before us." (emphasis added). (18)

Thus, the NLRB has determined that the "prohibitions" of the Act are fully applicable to the issue of collective bargaining rights for housestaff. Indeed, in the Board's view, the Act's prohibitions are not only "arguably" applicable but clearly prohibit collective bargaining rights for housestaff. (19) Furthermore, the Supreme Court has indicated that a labor activity can be deemed "prohibited" where there was an intention to deny such labor activity the protections of the Act. (20)

Moreover, a number of NLRB decisions, often with judicial approval, make clear that even the "protections" of the Act can be and have been extended to individuals other

(17) San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242 (1959).

(18) St. Clare's, supra, slip op. at p. 8.

(19) Kansas City, revised, supra, slip op. at p. 5; St. Clare's, slip op. at p. 7 and p. 13.

(20) Machinists v. W.E.R.C., supra.

than statutory "employees". (21)

In sum, the District Court's failure to conclude that labor activities relating to housestaff are encompassed within the protections and prohibitions of the Act within the framework of relevant Supreme Court decisions constitutes an additional basis for finding reversible error.

- D. The District Court Failed to Recognize That Preemption Must Occur in This Case Since the Health Care Industry Labor Relations Field Has Been Federally "Occupied" and Therefore Closed to State Regulation.

As the Supreme Court has recently noted in reviewing the law on preemption, the Court is obliged to recognize preemption - even where conduct is neither protected nor prohibited by the Act - if the labor relations field has been "occupied" and therefore closed to state regulation; Machinists v. W.E.R.C., supra at 2886, citing Teamster's Union v. Morton, 377 U.S. 252, 258, 56 LRRM 2225 (1964).

There should be little question that the entire field of health care industry labor relations - specifically including in relationship to housestaff - has been federally

(21) Talladega Cotton Factory, 32 LRRM 1479, 106 NLRB 295 (1953), enforced 213 F.2d 391, 34 LRRM 2196 (C.A. 5, 1954); Buddies Supermarkets, 223 NLRB No. 137, 92 LRRM 1008 (1976); Illinois Fruit and Produce Corp., 226 NLRB No. 27, 93 LRRM 1224 (1976); Oil City Brass Works v. N.L.R.B., 357 F.2d 466, 61 LRRM 2318 (C.A. 5, 1966); N.L.R.B. v. Better Monkey Grip Company, 243 F.2d 836, 40 LRRM 2027 (C.A. 5); cert. denied, 353 U.S. 864, 41 LRRM 2007 (1957); King Radio Corporation v. N.L.R.B., 398 F.2d 14, 68 LRRM 2821 (C.A. 10, 1968).

"occupied". As the NLRB recently noted:

"However, by our finding that housestaff are not 'employees', we certainly did not intend to imply that we were thereby renouncing entirely our jurisdiction over such individuals. To the contrary, we have asserted jurisdiction over all classifications at health care institutions - including house-staff - but feel that extending bargaining privileges to residents, interns, and fellows would not be in the best interest of national labor policy." (footnote omitted; emphasis added). (22)

Likewise, there is no basis to doubt that the complete occupation of the field by Federal labor policy and administration is entirely consistent with Congress' intention. Indeed, the District Court itself concluded "that Congress contemplated the preemption of state regulation of labor relations covered by these [Health Care] amendments". (23)

That being the case, the District Court erroneously failed to apply preemption in recognition of the clear fact that the field of health care industry labor relations is federally "occupied".

(22) St. Clare's, supra, slip op. at p. 13.

(23) 426 F.Supp. at 448.

III. The District Court's Decision Misconceives the Board's National Labor Policy Determinations.

A. The District Court Misinterprets Prior NLRB Decisions.

The District Court reverses the NLRB's announced labor policy of denying collective bargaining rights to students such as housestaff who work at the same institution from which they receive education, training and certification and whose work is related to their academic relationship to the institution by concluding that such policy is contrary to the Board's own prior decisions. As the District Court concludes:

"Thus, in the majority of these [prior NLRB] cases, the Board seems to have acted on the principle that student workers are covered by the Act, and to have simply determined that they should not be part of the particular unit that was petitioned-for, and not that they should or could never be part of any collective bargaining unit." (Slip op. at p. 30, referring to the Board's decisions in Leland Stanford, Barnard College, Cornell University, Georgetown University, College of Pharmaceutical Sciences and Adelphi University, all discussed hereafter).

* * *

"Accordingly, we do not discern in these cases the expression of a uniform national labor policy that workers who are also students or 'primarily students' should be denied collective bargaining rights."
426 F.Supp. at 452.

The District Court is simply wrong, however, in its interpretation of relevant Board cases. The Court admits that in one cited case (namely Leland Stanford Junior

University, 214 NLRB No. 82 (1974)), the Board specified the non-employee status of "student/employees" involved therein. The District Court regarded this decision as an aberration from substantial Board decisional policy to the contrary. While it is true that in the other Board decisions cited by the District Court, the Board did not make specific reference to "employee" or "non-employee" status, a careful analysis of these cases and the Board's subsequent decisions completely negates the District Court's conclusion that the NLRB ever granted "employee" status to students employed at their own educational institution, particularly where such work was in connection with their academic relationship to the institution.

Thus, the Board noted three years ago with regard to the Adelphi decision cited by the District Court as one of the cases indicating the Board's supposed policy of generally granting collective bargaining rights to "student/ employees":

"In sum, we believe these research assistants [who lack "employee" status] are like the graduate, teaching and research assistants who we found were primarily students in Adelphi University", 195 NLRB 693, 640 (1972). (24)

In a second decision cited by the District Court in this same vein, namely College of Pharmaceutical Sciences,

(24) Leland Sanford, supra, slip op. at p. 8.

197 NLRB No. 959, 80 LRRM 1456 (1972); the Board again made clear via other decisions its intent to deny the "student/employees" in Pharmaceutical Science "employee" status.(25)

In the three other cases referred to by the District Court as supporting the Court's conclusion, namely, Georgetown University, 200 NLRB No. 14 (1972); Cornell University, 202 NLRB No. 41 (1973); and Barnard College, 204 NLRB No. 155 (1973), the Board also denied "employee" status or concomitant collective bargaining rights, as the Board has recently reaffirmed.(26) Indeed, the District Court failed to recognize, as the Board points out, that those latter cases involve the somewhat different proposition of students who work at their own educational institution although their work (in the school's janitorial services or cafeteria) is not in connection with their academic concerns.(27) This latter, and even less compelling, category of cases also includes, despite the District Court's failure to cite them, San Francisco Art Institute, 226 NLRB No. 204 (1976) and Saga Food Service, 212 NLRB No. 133 (1974), where again the Board denied the students at issue collective bargaining rights.

(25) See Clark County Mental Health Center, 225 NLRB No. 105, 92 LRRM 1545, 1546 (1976).

(26) St. Clare's, supra, slip op. at p. 6.

(27) Ibid.

In sum, as th NLRB has made clear, its determination that housestaff should be denied collective bargaining rights because of national labor policy considerations "...is consistent with, and reflective of, longstanding national labor policy as developed and articulated by this Board". (28) As the Board has stated, in cases "...in which students perform services at their educational program...the Board has universally excluded students from units which include non-student employees, and in addition has denied them the right to be represented separately" (emphasis added). (29)

B. Valid and Important Rationales Exist for the NLRB's National Labor Policy in Regard to "Student/Employees".

The District Court's decision further invalidates the NLRB's authority to deny collective bargaining rights to "student/employees" because, in the District Court's view, the NLRB's labor policy considerations for its denial of collective bargaining rights are lacking in a rationale acceptable to the District Court. As the Court concludes:

"Nor have plaintiff or amici been able to articulate the rationale which would support such a national policy vis-a-vis students."
426 F.Supp. at 452-453.

(28) Ibid, slip op. at p. 4.

(29) Ibid, slip op. at p. 7.

In fact, a careful review of the Board's decisions on housestaff and other groups of students who "work" for their own educational institutions offers some rather cogent reasons for the Board's policy in this regard.

Thus, for one, the Board has long taken the position that it is not conducive to the purposes of the Act to provide collective bargaining rights for individuals whose employment relationships are of an intermittent, temporary or casual nature, rather than an expectedly permanent nature for any given employer. Thus, in one of the several cases on "student/employees", the Board determined that it would not effectuate the purposes of the Act to provide such individuals collective bargaining rights noting:

"We are influenced in our decision chiefly by the brief nature of the students' employment tenure... In our view the [students] are best likened to temporary or casual employees whose certification would predictably present unusually vexsome problems. For instance, owing to the rapid turnover that regularly and naturally occurs among [students], it is quite possible that by the time an election were conducted and the results certified the composition of the unit would have changed substantially." (30)

An additional and related long established policy of the Board involved in its "student/employee" cases is the denial of collective bargaining rights to individuals whose

(30) San Francisco Art Institute, 226 NLRB No. 204, 93 LRRM 1505, 1506 (1976).

primary interest is other than their specific employment relationship at issue before the Board. This rationale exists as well in "student/employee" cases where the Board has noted that "students" rendering services at their educational institution:

"...are serving primarily as students and not primarily as employees. In our view this is a very fundamental distinction for it means that the mutual interests of the students and the educational institution in the services being rendered are predominantly academic rather than economic in nature. Such interests are completely foreign to the normal employment relationship and, in our judgment, are not readily adaptable to the collective-bargaining process." (emphasis added, footnote omitted). (31)

Yet another rationale that the Board has indicated for its policy in regard to "student/employees" derives from the Board's traditional responsibility to maintain economic and functional viability of all industries over which it has jurisdiction. Where particular collective bargaining rights would be destructive of an industry, the Board has imposed limitations on these rights. (32) In that same vein, the Board has recognized that collective bargaining for "student/employees" can be very destructive of the school's educational

(31) St. Clare's, supra, slip op. at pp. 7-8.

(32) Thus, for example, the Board has traditionally placed limits on picketing being used to destroy an employer's business standing as, for example, by unduly criticizing its product.

relationship with, and responsibility to, its students and thereby also harmful to labor policy. As the Board has said:

"The inevitable change in emphasis from quality education to economic concerns which would accompany injection of collective bargaining into the student-teacher relationship would, in our judgment, prove detrimental to both labor and educational policies." (33)

While the Board's policies in regard to "student/employees" are fully justified by reasons sufficient to sustain even a de novo review, it must be noted that the District Court failed to afford the NLRB's determination on labor policy the substantial deference that is required to be afforded this administrative agency in view of its legislatively-granted authority and recognized expertise in labor policy matters. (34)

Indeed, there is a significant question as to whether the propriety of the NLRB's national labor policy determinations are ever reviewable in the context of the instant case. In point of fact, the propriety of the Board's labor policy determinations in regard to "student/employees" are already before another federal court in the proper context

(33) St. Clare's, supra, slip op. at p. 9.

(34) See, for example, NLRB v. United Insurance Company, 390 U.S. 254, 260 (1968), citing Universal Camera Corp. v. NLRB, 340 U.S. 474.

of a currently pending "Leedom-Kyne" suit filed by the appellee CIR (and others) against the appellant NLRB. (Physicians National Housestaff Ass'n v. Murphy, DDC, Civ. Action No. 77-0358 (Flannery J.)). It is only in such a "Leedom-Kyne" suit that there can be judicial review at this stage of the propriety of the Board's policy determinations and the District Court's de novo review of Board policy in the context of current "Nash-Finch" suit, limited to determining the effect of Board's decision on preemption of state jurisdiction, was in itself improper. (35)

Thus, in one of the Supreme Court decisions cited by the District Court as essential in determining preemption, namely, Bethlehem, supra, it was made implicitly clear that the NLRB's labor policy determinations were not a matter for judicial review and are neither specified (other than in conclusory terms) or commented on by the Court.

It was perhaps in conceptual recognition of the judiciary's limited review that the District Court's decision notes:

"The role of this Court is not to review this original determination by the Board [referring to the Board's determination in Cedars-Sinai that housestaff are not to be afforded the status of employees nor concomitant collective bargaining rights], and we therefore express no opinion as to its soundness." 426 F.Supp. at 449.

(35) See Boire v. Greyhound, 376 U.S. 473 (1964) and Bro. of Ry. & S.C. v. Ass'n for Ben. of Non-Con Emp., 380 U.S. 650 (1965), explaining and commenting on Leedom v. Kyne, 358 U.S. 184 (1958).

Regretably, however, the District Court's decision neither adheres to its own recognition of the Court's limited role nor, having undertaken to review the agency's underlying labor determination, takes proper account of the entirely valid reasons for that determination.

CONCLUSION

The judgment of the District Court on the issue of preemption should be reversed. Jurisdiction over the entirety of health care institution labor relations should continue to remain exclusively with the NLRB. The NYSLRB and the C.I.R. should be enjoined from taking any actions which may conflict with the NLRB's national labor policy determinations denying collective bargaining rights to housestaff.

Dated: New York, New York
June 6, 1977

Respectfully submitted,

Gerald A. Bodner, Esq.
Albert Einstein College of
Medicine
1300 Morris Park Avenue
Bronx, New York 10461

For the Second Circuit

National Labor Relations Board

Plaintiff-Appellant

v.

Committee of Interns & Residents

and

New York State Labor Relations Board
Defendants-AppellantsAFFIDAVIT
OF SERVICE

STATE OF NEW YORK,

COUNTY OF New York, ss:

Raymond J. Braddick, agent for Gerald A. Bodner Esq.

being duly sworn,

deposes and says that he is over the age of 21 years and resides at

11 Park Place New York, New York

That on the 6th. day of June 1977 19 at

666 Third Avenue New York, New York
he served the annexed Brief

upon

Murray A. Gordon Esq.

in this action, by delivering to and leaving with said attorney

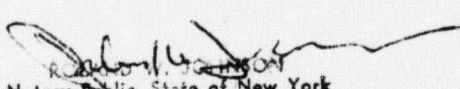
2 true copies thereof.

DEPONENT FURTHER SAYS, that he knew the person so served as aforesaid to be the person mentioned and described in the said action

Deponent is not a party to the action.

Sworn to before me, this 6th.

day of June 1977


Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1978

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